that will need to be answered. The RTC urges the Commission to address in this proceeding in reference to all incumbents, including small LECS, these questions listed by the Chairman: How can historic or embedded costs be determined? When will the determination be proper? What revenues are to be counted to cover such costs? Who has jurisdiction over this issue? Who should pay the costs?

In answering each of these questions, the Commission should consider the approach used by the Federal Energy Regulatory Commission in connection with its order providing for the unbundling of wholesale electric power.[47] The FERC concluded that wholesale costs might be stranded as a result of its decision providing for open access transmission. It said it had the responsibility to allow for the recovery of stranded costs because the prospect of not recovering such costs could erode utilities' ability to attract capital and be very detrimental to a diverse array of utility shareholders.[48] It also based its decision on a recognition that utilities had operated under a regime that required them to invest in wholesale generation facilities and to make services available on demand. It noted that it had been chided by the court for its inaction and failure to address market distortions resulting from uneconomic producer-pipeline contracts over which it had jurisdiction at a time when it was promulgating orders restructuring the natural gas industry.[49]

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[47] *See* Promoting Wholesale Competition Through Open Access Services by Public Utilities, Recovery of Stranded Costs, 75 F.E.R.C. 61,080 (1996).

[48] *Id.*

[49] *Id.* at n.586 (referring to *American Gas Distributors v. FERC*, 824 F.2d 981, 1021 (D.C.Cir. 1987).

The resulting disruption in telecommunications markets from the interconnection rules and access charge reform will be similar to the expected disruption from the FERC's open access order. The principles that the FERC has relied on apply to the analysis the Commission must make and the questions it must answer with respect to the incumbent LECs that have operated as regulated utilities, complied with and relied on Commission access charge rules, Commission licensing and reporting requirements and Commission orders requiring the deployment of specific technologies or infrastructure. The Commission will need to assess carefully the impact of its trilogy of proceedings changing the regulatory regime. It should consider to what extent and how its decisions will contribute to market collapse for certain incumbents that have heretofore had the obligation to continue to provide service. The precise determination of jurisdictional issues and the quantification of stranded costs will be difficult, but the Commission must nonetheless grapple with these issues and act to ensure that its decision is lawful and reasonable. For example, the Commission cannot ignore incumbent LEC obligations as carriers of last resort even though state law has been the basis of these obligations. Incumbents have largely fulfilled the Commission's universal service objective in the course of complying with state certification or franchising requirements.

IV. "REFORMED" ACCESS CHARGE RULES SHOULD AVOID UNJUSTIFIED DISCRIMINATION AND PREFERENCES, BENEFIT END USERS AND COMPLY WITH THE NEW LAW'S UNIVERSAL SERVICE PROVISIONS.

A. Terminating Access Treatment Should Be The Same For Incumbents And Their Competitors And Consistent With Fostering Efficient Use Of Telecommunications Services.

The NPRM[50] asks about whether and in what way the Commission should regulate terminating access services. It raises this question for both price cap incumbent LECs and CLECs and seeks comment on whether the effects of competition will be the same for terminating and originating access. The NPRM also asks[51] whether all LECs should be permitted to collect terminating access from end users, whether the calling or called party should pay for terminating access and whether giving carriers facing a specified level of competition the flexibility to follow market signals in apportioning access charges between carrier customers and end users would be lawful under the section 254(g) requirement for averaging urban and high cost rural interexchange rates.

1. There Is No Justification For Discriminating Between ILECS And LECS In Regulating Terminating Access.

The Commission itself identifies differences[52] between originating and terminating access, such as whether the calling party (originating access) or the receiving party (terminating access) decides to initiate the call, who chooses the service provider and who must pay for the call. It suggests that there is greater market power with regard to terminating access, since the

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[50] NPRM, ¶ 272.

[51] NPRM, ¶ 215.

[52] NPRM, ¶ 271.

called party chooses the access provider at the terminating end of the call, but the calling party initiates and pays for the call. Since the caller and his chosen interexchange carrier are unable to choose the terminating access provider, the Commission reasons (ibid.), this end of a call may retain bottleneck characteristics for whatever LEC serves the receiving party.[53] Significantly, whatever the level of terminating access market power, the Commission correctly acknowledges[54] that CLECs have the same potential for market power over terminating access as ILECs, because they are also not chosen by the calling party.

The NPRM contemplates different regulatory alternatives for ILECs and CLECs. However, the RTC believes that the similar situations in which ILECs and CLECs stand as to terminating access dictates that, above all, they must be subject to the same level of regulation or deregulation. Disparate regulation would competitively disadvantage the more restricted carrier -- virtually certain (although unfairly) to be the ILEC. The Commission must have a better reason than its "extreme[ ] reluctan[ce]" to regulate competitive entrants[55] to justify treating similarly-circumstanced parties differently.[56] Moreover, if the Commission imposes regulation out of concern that the CLEC could overcharge for terminating access, it would be silly to measure the CLEC's charges against the ILEC's charges. Such a baseless comparison could amount to an invitation to overcharge for termination whenever the CLEC's costs were lower

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[53]The NPRM further observes in n.357 that, under section 254(g), "the cost of high terminating access rates is spread among all end users."

[54] NPRM, ¶ 279.

[55] NPRM, ¶ 278.

[56] *See, Melody Music v. FCC,* 345 F.2d 730 (D.C. Cir. 1965).

than the ILEC's. Even to require a CLEC to support its costs only when they exceed the ILEC's costs[57] would discriminate against the ILEC. In short, in regulating competitors where there is no significant difference to justify disparate requirements, the Commission should focus on even-handed, competitively neutral treatment, not on finding "less intrusive methods of ensuring a competitive LEC's terminating access charges are just and reasonable."

2. The Commission Should Not Discourage Efficient Use Of The Network By Charging The Called Party For Terminating Access.

The alternatives proposed in the NPRM are inadequate:

First, imposing a rate ceiling based on "forward-looking economic costs" by requiring only an ILEC to produce a TSLRIC study[58] or by comparing the ILEC's interconnection prices under sections 251 and 252 with its terminating access charges (ibid.) would both discriminate against the ILEC and conflict with the Act's deregulatory and procompetitive purposes and the marketplace negotiation model that is the fundamental policy of the interconnection provisions. The Commission should discard those alternatives.

Second, recovering all ILEC originating and terminating access costs in the originating access charges or a flat charge would at least impose the cost of terminating access on the party deciding to make the call. However, disproportionately high originating access charges in high cost areas would increase the pressure on interexchange carriers to deaverage rural and urban toll rates, undermining geographically averaged toll rates, discourage interexchange carriers from competing in high cost areas and impose disproportionate support requirements on the interstate

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[57] NPRM, ¶ 280.

[58] NPRM, ¶ 274.

carrier of last resort, contrary to section 254(d). However, these universal service problems could at least be remedied with suitable universal service support arrangements.[59]

Third, and perhaps most damaging to the efficient network use pursued by the legislation and Commission policies, would be a requirement[60] to recover terminating access charges from the called party, as wireless carriers have done in the past. The Commission rightly calls attention to the concern that charging a party for receiving calls would result in unanswered calls. It is familiar information that many cellular telephone subscribers do not make their wireless telephone numbers known widely to avoid having to pay for receiving unwanted telephone calls.[61] The same result would be likely, but on a larger scale, if answering the wireline telephone exposed the passive recipient of the call to terminating access charges. Creating incentives not to accept telephone calls could, in turn, discourage full and efficient use of the public switched network that would maximize the value obtained for the resources involved in providing service.

Owing to the adverse effects of the heavily regulatory interventions it has proposed for terminating traffic, the Commission should seek a more flexible approach. Such an approach should not only apply the <u>same</u> terminating access charge requirements for ILECs and CLECs, but should also seriously consider allowing all such LECs to set their terminating access charges

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[59] *See* Section IV. 5, *infra.*

[60] NPRM, ¶ 275.

[61]The cellular industry may be moving away from charging for incoming calls. In any event, the cellular user knows he or she will be charged the per minute rate when a call is answered. Wireline users, on the other hand, without caller ID, would not know when the charge applies until it is too late to avoid it.

in response to market signals, subject to the requirement to justify their actual cost of such terminating service upon a complaint, supported by evidence of inconsistent charges for similar service or other information sufficient to warrant further Commission investigation.

B. The Commission Should Require Interexchange Carriers To Pass All Access Charge Reductions Through To Their End Users.

The Commission focuses almost entirely on the need for pro-competitive and deregulatory reforms in the access charge system. While these are, indeed, central concerns under the 1996 Act, they share center stage with the Act's strong commitment to universal service and nationwide network development (sec. 254). Even in a competitive environment, section 254 teaches, regulators should ensure that all customers benefit from evolving telecommunications, including those for whom marketplace forces cannot yet be relied upon as the sole force behind "just, reasonable and affordable rates," "reasonably comparable" urban rural rates and services, access to advanced and telecommunications and information services and parity in interexchange rates for urban and rural customers and from state-to-state.

Interexchange carriers have worked ceaselessly and apparently successfully (e.g., ¶ 41) to persuade the Commission of the need to reduce their access charges; and ILECs have shown the importance of allowing them to set their charges far more flexibly in the competitive era ushered in by the 1996 Act. The NPRM suggests,[62] as an expected consumer benefit, that interexchange rates will decrease when access charges decrease. The Commission's faith that interexchange competition will provide interexchange customers with rates based on economic cost — presumably forward-looking cost — is dubious, given the immediate interstate rate increases by

[62] *See,* ¶ 42.

the three largest interexchange carriers when the Commission declared AT&T non-dominant and forbade tariffs for virtually all its services.[63] Indeed, the Commission has never performed a reality check on the competitive interstate market it claims credit for fostering. It should take advantage of the opportunity to test the outcome of its predictions for interstate competition by collecting sufficient information from the interexchange carriers -- who are forever touting TELRIC and TSLRIC for LECs -- to demonstrate whether their competitive interstate interexchange rates actually reflect forward-looking economic cost.

In the meantime, the Commission should prescribe a proportional pass through by all interexchange carriers of all access charge reductions to all classes of customers in the form of lower interexchange rates. The statute requires no less, since it calls for rate parity for rural and urban customers and for customers in different states and for "reasonably comparable" rural and urban rates and services. Allowing interexchange providers instead to use their access savings solely to benefit large, corporate and urban customers or to increase their profitability would sacrifice the interests of rural consumers and small businesses to deaveraging the Act seeks to mitigate.

C. The Commission Cannot Justify Forbearing From Enforcing The Act's Geographic Interexchange Rate Averaging Requirement Rather Than Providing "Sufficient" Universal Service Support To Make The Policy Work.

The Commission seeks comment[64] on whether it can lawfully require interexchange carriers to recover CCL costs by means of a flat-rated end user charge that differs from state to state or

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[63] *See, Communications Daily,* "AT&T Raises Rates 5.9% on Residential Long Distance, MCI 4.9%," pp 1-2 (Friday, Nov. 29, 1996).

[64] NPRM, ¶ 63.

between rural and urban areas. If section 254 prevents such a charge, asks the NPRM, "do conditions exist sufficient to require the Commission to forbear from the application of section 254(g) to IXC recovery of flat rate charges from their end users?" Later in the NPRM,[65] the Commission asks about the effect of allowing geographically deaveraged charges for access elements, in light of the averaging requirements of section 254(g)(1)-(2). The short answer is that the Commission cannot justify taking any action or forbearing from enforcing any provision of law that will imperil geographic toll rate averaging or rural-urban rate and service comparability.

The RTC is not aware of any bar to requiring or allowing ILECs to bulk-bill assess flat-rate CCL access charges on interexchange carriers. However, that is not the case with regard to imposing flat rate end user charges that vary among the states or between rural and urban areas. The language of section 254(g) is unambiguous: "Providers of interexchange telecommunications services," it ordains, are not permitted to charge rates to their "subscribers" that are higher than rates they charge subscribers in " rural and high cost areas" or (b) that in any state exceed "the rates charged to its subscribers in any other state." The Act thus establishes interexchange rate parity as a standard for universal service and consumer protection against contrary marketplace pressures. In effect, it fleshes out the Act's requirements for "just," "reasonable," and "not unjustly or unreasonably discriminatory" rates and terms. Similarly, the universal service section involves criteria for what ends "protection of customers" should achieve. The forbearance standards in section 10 of the 1996 Act (*See* NPRM, n.54) basically ask whether laws and regulations can be repealed without sacrificing these purposes.

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[65] NPRM, ¶ 186.

Consequently, to justify forbearing from section 254(g), the Commission must be able to conclude either (1) that the marketplace will provide interexchange rate parity and protect customers, as the universal service provision requires, without the specified regulatory intervention or, at the very least, (2) that it is no longer unjustly and unreasonably discriminatory or inadequately protective of customers in high cost areas or states to permit deaveraging of interexchange rates. Congress must necessarily have believed that the universal service provisions were necessary when it adopted the Act, or it would not have included the specific interexchange averaging, rural-urban comparability and other requirements in section 254.

For interexchange carriers to impose flat rates that differ from rural to urban and state to state is unmistakably at odds with the unqualified prohibition against "higher" charges for customers in high cost areas or high cost states.[66] Nor is there any indication that circumstances have changed so radically since adoption of the Act that the marketplace alone will maintain the rate parity Congress mandated. Finally, there is no reason to claim, much less to assume, that deaveraged charges will be any less unjust and discriminatory or will protect consumers a bit more adequately now than when the Act was enacted. It is particularly peculiar for the Commission (a) to report the Joint Board's recommendation against raising the SLC (¶ 64) but (b) to consider establishing a second deaveraged and apparently uncapped flat rate charge per customer for interexchange access (¶ 60) that is indistinguishable from an uncapped and deaveraged SLC and (c) to assume that this deaveraged neo-SLC protects consumers well enough and is sufficiently in the public interest to require Section 10 forbearance. That conclusion

[66]A nationwide average charge per interexchange end user would not present either the need for forbearance or the conflict with rural parity of the approach suggested in the NPRM.

cannot be rationally entertained. The Commission should, thus, reject out of hand any proposal to forbear from applying section 254(g) as written.

The Commission's reasonable concern[67] about the impact on interexchange carriers from allowing geographically deaveraged charges warrants further action under section 254. Such action is necessary to maintain averaging of interexchange end user rates without (a) forcing an illegal "implicit" subsidy on interexchange carriers, (b) discouraging interexchange competition in high cost rural areas and states or (c) and exacting an unequal contribution to support universal service from some interexchange service providers. The pressure to deaverage interexchange rates increases when access charges imposed on interexchange carriers serving only selective markets or regions are deaveraged to levels that further augment the differential in rates for serving high cost areas and rural states. AT&T, for example, has sought to deaverage rates regionally to better its competitive position. Coupled with the Commission's recent decision to detariff all interstate charges, with minimal provision for enforcing statutory rate averaging,[68] the incentive for deaveraging or diminishing service to high cost places is likely to become ever more compelling. And the clear, although indirect, consequence is to impose implicit subsidy obligations on interexchange carriers that serve high cost routes and to exact discriminatory universal service contributions from these carriers because they cannot lawfully eliminate or degrade the quality of interexchange service on high cost routes. These implicit subsidy and disproportionate universal service contribution burdens are likely to fall most heavily upon

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[67] NPRM, ¶¶ 186.

[68] The RTC has filed a request for reconsideration of the Commission's detariffing decision.

AT&T, with its nationwide carrier of last resort obligations, and the large LECs that have similar obligations for intrastate toll service. Conversely, interexchange carriers that shun high cost service receive a double competitive boost from escaping the support and contribution obligations and from further ability to cream skim at still lower rates.

There are two ways to remedy these conflicts with section 254 and remove impediments to true competition:

First, the Commission must reconvene the Joint Board charged with implementing section 254. That Joint Board proceeding could then adopt "specific, predictable and sufficient" mechanisms to compensate interexchange carriers that are duly designated as eligible for universal service support pursuant to section 214(e)(2) or (3). The mechanism would allow these interexchange carriers to recover from the high cost fund for the higher costs incurred in providing lawfully averaged interexchange service to fulfill their universal service obligations on routes where deaveraged access charges result in higher than average costs.

The second alternative would be for the reconvened Joint Board to adopt "specific, predictable and sufficient" mechanisms to reduce the access charge disparity for routes on which the marketplace alone would not otherwise provide service at lawful averaged rates. The second alternative is preferable for at least three reasons: First, the result of supporting access charges would be to encourage interexchange carriers to serve, continue to serve and not to surreptitiously deaverage the rates on high cost routes. Second, it would be easier to enforce the requirement in section 254(e) that support must be used for the "facilities and services for which the support is intended" when the support is targeted to precisely the access costs which raise interexchange carriers' cost for rural routes. And, third, support would be directed to the carriers that are already eligible by state designation, maintaining administrative simplicity.

V. THE COMMISSION MUST PERFORM A REGULATORY FLEXIBILITY ANALYSIS AND CONSIDER HOW ITS DECISION WILL AFFECT THE ECONOMIC INTERESTS OF SMALL INCUMBENT LECS.

In its Initial Regulatory Flexibility Analysis (IRFA), the Commission incorrectly concludes that its rules will not have a significant economic impact on "small entities" otherwise protected by the Regulatory Flexibility Act ("RFA").[69] There is no factual basis for the Commission's cursory conclusion that the rules would only apply to carriers subject to price cap regulation. As the RTC has shown above, whatever access charge rules are adopted in this proceeding will affect approximately 65% of the revenues of its small LEC member companies. As shown below, these LECs are "small entities" despite the Commission's repeated assertions to the contrary. The Commission is required to consider adverse economic impacts its rules may have on these companies whenever it promulgates a rule that requires public comment under the Administrative Procedure Act.[70]

In this and other proceedings implementing the Act, the Commission has attempted to evade its obligation under the RFA by relying on an erroneous definition of "small entities." According to the Commission, incumbent LECs are not "small entities" because they are "dominant" in their field. In 1986, the Commission first concluded that the Regulatory Flexibility Act did not apply to incumbent LECs, no matter how small. At that time, it reasoned that every incumbent LEC, no matter how small was not a "small entity" under Section 3 of the Small Business Act

[69] NPRM, para 346.

[70] 5 U.S.C. §§ 603, 604.

based on its interpretation of that act.[71] In a Report and Order released in 1987, the Commission simply affirmed its 1986 conclusion with the cursory statement, "[n]o argument has been advanced that would cause us to modify that determination."[72]

The Commission notes in this NPRM that the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act.[73] To be precise, the RFA provides:

> the term 'small business' has the same meaning as the term 'small business concern' under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.

Section 3 of the Small Business Act in turn, among other things, states that "a small -business-concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation. . . ." 15 U.S.C. § 632(a)(1). The SBA Administrator may use additional criteria in defining a small-business-concern but other federal agencies are prohibitied from so doing without first pertaining SBA approval and providing for public notie and comment. 15 U.S.C. § 632(a)(2). SBA regulations implement Section 3 of the Small Business Act by providing that other agencies must use SBA regulations that define whether a business entity is small unless they establish a different definition that complies with SBA requirements and that receives the approval of the SBA Administrator.[74] The Commission skirts

[71] Regulation of Small Telephone Companies, *Notice of Proposed Rulemaking,* 51 Fed. Reg. 45912 (proposed December 23, 1986).

[72] Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd 3811, 3815 (1987).

[73] NPRM, para 347.

[74] 13 C.F.R. § 121.902.

these requirement, by referring to 15 U.S.C. § 632 (a)(1) alone, defying 15 U.S.C. § 632 (a)(2) and SBA regulations which prohibits it from prescribing the definition of a "small entity" and relying on its 1987 prior conclusion that incumbent LECs are dominant.

The Commission's failure to abide by all the provisions of the RFA is improper. Section 3 of the SBA gives the SBA clear authority to look at size criteria in determining dominance for purposes of its definition of a "small entity." 15 U.S.C. § 632 (a)(2)(B)states that the SBA may utilize number of employees, dollar volume of business, net worth, net income, a combination thereof or other appropriate criteria in determining factors under 632 (a)(1) which includes dominance. This is what the SBA has done in promulgating 13 C.F.R., Part 121 which defines what businesses are "small entities" in terms of size. Those size standards already take into account "economic characteristics comprising the structure of an industry, including degree of competition, average firm size, start-up costs and entry barriers, and distribution of firms by size."[75] The regulations specifically state that "[s]ize standards seek to ensure that a concern that meets a specific size standard is not dominant in its field of operation."[76]

The Commission acknowledges that SBA rules define a small telecommunications entity as one with 1,500 employees but insists that all incumbent LECs are dominant and factors that conclusion into its determination of whether any incumbent is a "small entity." Of course, this is wrong. The SBA is charged with defining what a "small entity" is and that agency has already considered the statutory criteria of "dominance" in arriving at its definition. If every agency required to comply with the RFA were allowed to flout federal statutes and SBA regulations as

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[75] *Id.*

[76] *Id.*

the Commission has done here, the rights granted small businesses under the RFA would soon become mneaningless. That, of course, is not what Congress intends as it most recently demonstrated by strengthening the RFA to provide for judicial review.[77]

Small incumbent LECs meeting the SBA's definition of "small entity" are among the class of carriers that will be affected by the access charge changes proposed in this NPRM. It is therefore imperative that the Commission perform an RFA analysis so that it may consider any adverse impact the proposed rules will have on these companies and review alternatives which may reduce adverse impacts on the companies.

[77] Section 242 of Small Business Growth and Fairness Act of 1996, Pub. L. 104-121. These protections now give a small entity adversely affected by final agency action the right to judicial review of agency compliance with the requirements of Sections 601, 604, 605(b) and 610 of the RFA.

CONCLUSION

The RTC urges the Commission to promulgate rules that are consistent with the above comments and that take account of the interests of the small incumbent LECs providing service to high cost areas.

Respectfully submitted,

THE RURAL TELEPHONE COALITION

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January 29, 1997

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the Rural Telephone Coalition in CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 91-213 and CC Docket No. 96-263, FCC 96-488 was served on this 29th day of January 1997, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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